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In the Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Based on its findings that respondent Conair Corporation's extensive unfair labor practices[1] undermined nascent union support and foreclosed any possibility of holding a fair representation election, and that "a remedial

[1]The Board, in agreement with the administrative law judge, found that Conair engaged in conduct violative of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), including threats of loss of existing benefits and of plant closure, promises and grants of additional benefits, and coercive interrogation. Pet. App. 116a-117a, 119a-124a. Also in agreement with the administrative law judge, the Board found that Conair violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by failing immediately to reinstate 81 unfair labor practice strikers upon their unconditional offer to return to work, by refusing to reinstate 13 other unfair labor practice strikers, and by discriminatorily discharging 3 strikers following their reinstatement. 261 N.L.R.B. 1189, 1279-1282. Additionally, the Board (Chairman Van de Water and Member Hunter dissenting) found that Conair violated Section 8(a)(3) and (1) of the Act by discharging all the unfair labor practice strikers while the strike was in progress. Pet. App. 114a-116a.

bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization" (Pet. App. 125a), the Board (then-Chairman Van de Water and Member Hunter dissenting) issued a bargaining order despite the absence of tangible evidence that the Union had ever achieved majority status.[2] The Board found that "this case is the 'exceptional' type envisioned in *Gissel* which warrants the [issuance] of a remedial bargaining order 'without need of inquiry into majority status on the basis of cards or otherwise' " (Pet. App. 124a).[3]

2. The court of appeals upheld the Board's unfair labor practice findings except for the finding that Conair had unlawfully discharged all the strikers during the strike (Pet.

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[2]The Board noted, however, that there was a reasonable basis for concluding that the Union would have enjoyed majority status but for Conair's unlawful actions because 46% of the employees signed authorization cards in a short period of time before the unfair labor practices took their toll (Pet. App. 128a).

[3]In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Court, reversing the Fourth Circuit in three cases, sustained the Board's authority to require an employer to recognize and bargain with a union that based its claim to representative status on authorization cards where (1) the employer had engaged in unfair labor practices that tended to preclude the holding of a fair election, (2) "there is also a showing that at one point the union had a majority," and (3) the Board "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615. While all of the cases resolved in *Gissel* involved card-based claims of majority status, the Court noted that the Fourth Circuit itself (see *NLRB* v. *Logan Packing Co.*, 386 F.2d 562, 570 (1967)) had "left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" (395 U.S. at 613).

App. 20a-32a). The court also accepted the Board's "expert appraisal" (*id.* at 36a) that Conair's unfair labor practices were "so 'outrageous' and 'pervasive as to . . . render[] impossible a fair election' " (*id.* at 33a). But a majority of the court held that the Board lacks statutory authority to issue a non-majority bargaining order (*id.* at 41a-59a). The court concluded that neither the text of the Act nor its legislative history "suggests that Congress contemplated general authority in the Board to select or designate a union for employees, a majority of whom never signaled assent to the arrangement" (*id.* at 45a). Nor, in the court's view, did this Court's decision in *Gissel* require a contrary conclusion. Since the cases covered by that decision all involved situations in which the union had majority support at one time, the court of appeals concluded that *Gissel* left open the issue of Board authority to issue non-majority bargaining orders (Pet. App. 50a). Finally, the court concluded that non-majority bargaining orders were contrary to the Act's twin policies of freedom of choice and majority rule in employee selection of bargaining representatives (*id.* at 51a-55a).[4]

Judge Wald dissented. She found nothing in the language of the Act, its legislative history, or its policies that would limit the Board's authority to issue non-majority bargaining orders (Pet. App. 77a-95a).

3. On May 14, 1984, the Board issued its decision in *Gourmet Foods, Inc.*, 270 N.L.R.B. No. 113, in which it overruled "those cases in which the Board has found that it has statutory remedial authority to issue nonmajority bargaining orders and in which the Board has exercised that

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[4]In all other respects, save one, the court enforced the remainder of the Board's order, including extraordinary notice and access remedies (Pet. App. 40a-41a, 58a-59a, 98a-102a). The exception related to an issue as to which the court found that Conair had not received timely notice of the question to be litigated (*id.* at 23a-24a).

authority" (*id.* at 16-17 (footnote omitted)).[5] Chairman Dotson and Member Hunter concluded that the "majority rule principle is such an integral part of the Act's current substance and procedure" that it imposes "a direct limitation on the Board's existing statutory remedial authority" (*id.* at 16) and expresses a policy that "would compel us to decline to issue a nonmajority bargaining order even if we had the authority to do so" (*id.* at 24). Member Dennis, who concurred, agreed, for the reasons expressed in the majority opinion of the court below in this case (Pet. App. 41a-57a), that "imposition of nonmajority bargaining orders is inconsistent with the Act's bedrock principles of employee free choice and majority rule" (270 N.L.R.B. No. 113, at 29 (footnote omitted)).[6]

4. Petitioner, the charging party before the Board, seeks review of the decision of the court below that the Board lacks statutory authority to issue a non-majority bargaining order as a remedy for the kind of "outrageous" and "pervasive" unfair labor practices that occurred here, contending that it is inconsistent with this Court's decision in *Gissel* and in conflict with the decision of the Third Circuit in *United Dairy Farmers Cooperative Ass'n* v. *NLRB*, 633 F.2d 1054 (1980).

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[5]Copies of the Board's decision in *Gourmet Foods* have been lodged with the Clerk and served on the parties to this proceeding.

[6]Member Dennis added that, even if "the Board had the statutory authority to issue a nonmajority bargaining order," she would decline to issue one in *Gourmet Foods* because, on the facts of that case, she did not believe that "such an order would best effectuate the policies of the Act" (270 N.L.R.B. No. 113, at 29 n.4).

Member Zimmerman dissented from the Board's holding that it lacks authority to issue non-majority bargaining orders. 270 N.L.R.B. No. 113, at 32-47.

a. It is true that the decision of the court of appeals here conflicts with the holding of the Third Circuit that the Board possesses authority to issue non-majority bargaining orders. Nevertheless, resolution of that conflict is not warranted at this time. As indicated, it is the position of two members of the current four-member Board that, even if the Board were empowered to issue non-majority bargaining orders, it should refrain from exercising that authority as a matter of policy. No court of appeals, including the Third Circuit, has as yet had occasion to decide whether the Board is required to issue such orders even if, as a matter of policy, it would prefer to refrain from doing so. Should the courts of appeals uphold the position that, even if the Board has power to issue non-majority bargaining orders, it may properly refuse to do so as a matter of remedial discretion, the conflict among the circuits over the Board's statutory authority to issue such orders would become academic. Moreover, since the Board in *Gourmet Foods* has adopted the view of the court below that the Board lacks statutory authority to issue non-majority bargaining orders, review of the statutory authority question, should it ever become necessary, would be more appropriate in a case that reflects the current position of the Board.

b. Contrary to petitioner's contention (Pet. 10-14), the decision of the court of appeals here is not inconsistent with this Court's decision in *Gissel*. As the court of appeals correctly pointed out (Pet. App. 46a n.82), all four of the cases consolidated for decision in *Gissel* involved situations in which unions had obtained majority support based on authorization cards. As the court of appeals further pointed out (Pet. App. 46a-48a), the Court's observation concerning so-called Category I cases (those " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" in which a bargaining order might be imposed without an inquiry into majority status (395 U.S. at 613)) merely

noted dictum of the Fourth Circuit suggesting that a bargaining order might be appropriate in such circumstances. Moreover, the Board cases referred to by the Court in *Gissel* (395 U.S. at 614) in its discussion of Category I cases all involved situations in which, although there was no finding of an unlawful refusal to bargain or a bargaining demand, the unions involved had obtained majority status at one time. Similarly, *Sinclair Co.* v. *NLRB*, the only case consolidated with *Gissel* to be treated as a Category I case (395 U.S. at 615), involved a situation in which the union had obtained majority support based on authorization cards. Accordingly, as the Board stated in *Gourmet Foods*, 270 N.L.R.B. No. 113, at 22 (citation and footnote omitted), " 'even under the interpretation of *Gissel* most favorable to [* * * proponents of nonmajority bargaining orders], all that can be fairly said is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support.' "[7]

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[7]Moreover, as the court below noted, it was not until 1980 (11 years after the decision in *Gissel*) that "a court squarely held that the NLRB has the authority to issue a bargaining order despite the absence of tangible evidence that the union ever secured the support of a majority of the affected employees," and "[t]he full Board itself did not rule unequivocally on the question until 1982, in the case at hand" (Pet. App. 41a-42a (footnotes omitted)). The Board "took that action by a bare, one-vote margin" (*id.* at 56a). Thus, while petitioner is correct (Pet. 9 & n.4) that the question of the Board's authority to issue non-majority bargaining orders has been widely *discussed*, that remedy has not been widely *used*: the Board has seen fit to employ it only twice in the almost 15 years since *Gissel* was decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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